Supreme Court, U.S.
FILED
JAN 24 1994
OFFICE OF THE CLERK

No. 93-982

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN C. VIERRETHER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONER

Of Counsel:

BARTON F. STICHMAN
NATIONAL VETERANS
LEGAL SERVICES PROJECT
2001 S St., N.W.
Washington, D.C. 20009

GUY J. FERRANTE
(Counsel of Record)
KING & EVERHARD, P.C.
450 West Broad Street
Falls Church, Virginia 22046
(703) 241-8282

Counsel for Amicus Curiae

JANUARY 1994

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Interest of the *Amicus* 1
Argument 2

A "CONVENIENCE OF THE GOVERNMENT" DISCHARGE WITH AN RE-4 REENLISTMENT CODE IS STIGMATIZING, ESPECIALLY WHEN ISSUED TO A CAREER SERVICEMEMBER 2

Conclusion 5

TABLE OF AUTHORITIES

Cases:

Board of Regents v. Roth, 408 U.S. 564 (1972) 4
Casey v. United States, 8 Cl. Ct. 234 (1985) 2

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-982

STEPHEN C. VIERRETHER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONER

Interest of the *Amicus*

Vietnam Veterans of America ("VVA") is a nonprofit national veterans service organization chartered by Congress. Its membership is composed of over 40,000 veterans of the Vietnam era in more than 500 chapters. Vietnam-era veterans, including some of VVA's members, are on active duty in the armed forces today. In 1985, VVA instructed its Legal Services Program to intervene in cases where civil liberties issues affecting active duty personnel are at issue.[1]

[1] Consents to the filing of this brief have been lodged with the Clerk.

Chief Vierrether's petition should be granted. As the military services opt to trim budgets by reducing payroll, it becomes increasingly important for the judiciary to ensure that those who are honorably discharged for the "convenience of the government" are not unfairly harmed in the process.

Argument

A "CONVENIENCE OF THE GOVERNMENT" DISCHARGE WITH AN RE-4 REENLISTMENT CODE IS STIGMATIZING, ESPECIALLY WHEN ISSUED TO A CAREER SERVICEMEMBER

A military discharge is not the same thing as a "pink slip" from a civilian employer. Time spent by an individual in the service of the country, as a member of one of the armed services, is inherently different from time spent in any other vocation. Like the familiar Scholastic Aptitude Test which gives colleges and universities a numerical score to aid in evaluating students from diverse backgrounds, the circumstances of a military discharge provide standardized information which is routinely used for a variety of civilian purposes nationwide. As a result, questions about military service and the circumstances of one's separation therefrom are a routine part of employment decisions not only for civil service jobs but for innumerable positions in the private sector as well. And the use of codes or other abbreviations will not preclude the message from being conveyed. *See Casey v. United States*, 8 Cl. Ct. 234, 242-43 (1985) (even information "for official use only" is known and understood by "the part of society that counts—*i.e.*, prospective employers"). If a particular job is even remotely defense-related or involves any kind of a security clearance, as many do, attention to prior military service could be, and often is, determinative. There is no known civil record of

comparable scope and importance. A military discharge lasts a lifetime. In this day and age, it is virtually impossible to avoid the repercussions of a stigmatizing discharge.

The importance of information about a discharge is at least partially attributable to the fact that military service is something a large segment of the population can identify with. Millions of Americans have served in uniform. They know from first-hand experience what things *really* mean—regardless of what they happen to be called. That substantial segment of the community at large knows, for example, that an Army, Air Force or Marine Corps officer would be a Second Lieutenant first, and a First Lieutenant second.

Another thing they all know is that individuals who are discharged "for the convenience of the government" were discharged under unusual circumstances of some kind. Such a discharge indicates that the normal reasons for a discharge—end of enlistment, retirement, medical condition—did not apply. Rather, the action was for the government's "convenience," This, in itself, puts the veteran under a cloud, as it is likely to cause a prospective employer to want to know more.

But when the uncertainty of a "convenience of the government" discharge is combined with an RE-4 reenlistment code,[2] a definite red flag is raised. The message *now* being conveyed by the military is, "We are discharging you for our convenience, AND WE DON'T *EVER* WANT YOU BACK." What began as a cloud has now blossomed into a thunderhead. The recipient of this further information knows not only that there was something unusual about

---

[2] An RE-4 code is the worst of all because it declares the veteran ineligible to reenter military service of any kind in any capacity. It is often referred to as a "bar to reenlistment." An RE-1 code, which is the best of the lot, indicates that the veteran is eligible to reenlist. Between those are RE-2 and RE-3. They involve less stringent bars.

the circumstances of the discharge but also that those circumstances were such that further service by that individual was out of the question.

When the foregoing information pertains to someone within two years of qualifying for retirement, like the petitioner here, the situation rises to the level of a maelstrom. An 18-year veteran being sent home and told never to come back suffers stigmatizing damage to his reputation from which he or she may never recover. Employers and other members of the community are bound to wonder why someone who had served honorably for nearly 18 years wasn't welcome back for two more. This is what "stigma" is all about.

There are substantial tangible, economic consequences to the discharge this petitioner received, as well. His immediate employment was terminated by the "convenience" discharge. But his prospects for *future* employment were adversely affected by the RE-4 code, even beyond the fact that private sector employers look unfavorably upon this information. While the Coast Guard imposed the RE-4, the other military services honor it as faithfully as their own. They bar him. The Coast Guard has thus "foreclosed his freedom to take advantage of *other* employment opportunities." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (emphasis added). This it could not do without at least affording him a hearing.

Lastly, there is the fact that this petitioner has been deprived of nearly 18 years of equity in his retirement—a retirement he will *never* be able to earn since neither the Coast Guard nor the other military services will permit him to serve the short time he needs in order to qualify.

GIs suffer both stigmatizing damage to their reputations and tangible interference with their ability to make a living when they are discharged for the convenience of the government and issued disqualifying reenlistment codes. The stigma and interference only become worse when the

individual, like petitioner, had had a long career and was fast approaching retirement eligibility. The loyal members of our armed services deserve, and Due Process demands, the opportunity for a personal hearing—prior to such damage being inflicted.[3]

Conclusion

For the foregoing reasons, and in light of the importance of the issues presented, Chief Vierrether's petition for a writ of certiorari should be granted.

Respectfully submitted.

Of Counsel:

BARTON F. STICHMAN
NATIONAL VETERANS
LEGAL SERVICES PROJECT
2001 S St., N.W.
Washington, D.C. 20009

GUY J. FERRANTE
(Counsel of Record)
KING & EVERHARD, P.C.
450 West Broad Street
Falls Church, Virginia 22046
(703) 241-8282

Counsel for Amicus Curiae

JANUARY 1994

---

[3] The Court of Federal Claims erroneously suggested that petitioner's appeal to the BCMR may have been sufficient, as a post-discharge hearing, to satisfy the demands of due process. Pet. App. 21a n.5. In actuality, the vast majority of cases are decided by the various BCMRs without a hearing. This is especially true of the Coast Guard BCMR, which for all practical purposes has gone out of the business of conducting hearings. The board denied Chief Vierrether's request for a hearing, *id.* 28a, 36a, and his appeal, like that of the overwhelming majority of others, was resolved on the basis of the written record alone. He has never had the opportunity to appear in person before any forum to address the matters which have had such a devastating impact on both his past career and his future livelihood.